STATE OF MICHIGAN

COURT OF APPEALS

THERESA ROYCE and CARL ROYCE, Plaintiffs-Appellees/Cross-Appellants,	FOR PUBLICATION August 7, 2007 9:00 a.m.
v	No. 266682 Genesee Circuit Court
CHATWELL CLUB APARTMENTS, a/k/a TOBIN GROUP, Defendant-Appellant/Cross-Appellee.	LC No. 04-080383-NO Official Reported Version

Before: Servitto, P.J., and Jansen and Schuette, JJ.

SCHUETTE, J. (*concurring in part and dissenting in part*).

I concur in the portion of the majority opinion that reverses the trial court's denial of defendant's motion for summary disposition regarding plaintiffs' common-law premises liability claim. However, because I do not believe that the trial court erred in granting defendant's motion for summary disposition regarding plaintiffs' statutory claim, I must respectfully dissent from that portion of the opinion.[1]

I agree with the majority that plaintiffs' common-law premises liability claim failed to state a cause of action because the dangerous condition of the parking lot here in question—covered in icy, slippery snow—was open and obvious and contained no special aspects making the condition unreasonably dangerous. *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005) (*Kenny II*); *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001); *Ververis v Hartfield Lanes* (*On Remand*), 271 Mich App 61; 718 NW2d 382 (2006).

[1] I also agree with the majority's conclusion that a review of the record in this case does not clearly reveal whether the defendant was on notice of the condition of the parking lot. Therefore, it is appropriate for this panel not to address the notice issue.

I disagree, however, with the majority's conclusion that the trial court erred in summarily dismissing plaintiff's statutory claim because *Allison v AEW Capital Mgt, LLP* (*On Reconsideration*), 274 Mich App 663; 736 NW2d 307 (2007) (*Allison II*), controls the outcome of this case. As expressed below, I dissent primarily for procedural reasons—I believe that the *Allison II* panel erred in concluding that it was not bound by this Court's decision in *Teufel v Watkins*, 267 Mich App 425; 705 NW2d 164 (2005)—and because I desire to provide the trial courts and the bar with a clear roadway when traversing the pitfalls of slip-and-fall cases involving icy pavements, sidewalks, and parking lots in a cold-weather state like Michigan.

The judicial meander on black ice and slippery parking lots commenced when our Supreme Court adopted Judge GRIFFIN's dissent in the case of *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99; 689 NW2d 737 (2004) (*Kenny I*), rev'd 472 Mich 929 (2005). *Kenny II*, *supra*. *Kenny* involved an icy, snow-covered parking lot. *Kenny I*, *supra* at 115 (GRIFFIN, J., dissenting). In that case, the plaintiff argued that the open and obvious danger doctrine did not apply because the dangerous condition at issue was black ice, which, by its very nature, is not readily noticeable. *Id*. at 118. However, Judge GRIFFIN concluded that the dangerous condition of the parking lot was open and obvious because "after witnessing three companions exit a vehicle into the snow-covered parking lot on December 27 and seeing them holding on to the hood of the car to keep their balance, all reasonable Michigan winter residents would conclude that the snow-covered parking lot was slippery." *Id*. at 120. Further, because "[s]now and ice in a Michigan parking lot on December 27 are a common, not unique, occurrence," Judge GRIFFIN concluded that there were no special aspects of the dangerous condition of the parking lot that would negate application of the open and obvious danger doctrine. *Id*. at 121.

After *Kenny*, the question whether a snow-covered surface would always present an open and obvious danger arose, and this Court answered in the affirmative. *Ververis*, *supra*. In *Ververis*, after considering Judge GRIFFIN's dissent in *Kenny I*, which was adopted by our Supreme Court in *Kenny II*, and our Supreme Court's orders issued after *Kenny II*, this Court held that "by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis*, *supra* at 67.

Paralleling these black-ice decisions was the decision in *O'Donnell v Garasic*, 259 Mich App 569, 581; 676 NW2d 213 (2003), which stands for the proposition that the open and obvious danger doctrine cannot be used to avoid liability when the defendant has a statutory duty under MCL 554.139 to maintain the premises in reasonable repair. I am in agreement with this line of cases, which correctly applies the plain meaning of the language that the Legislature used by providing a statutory remedy to a plaintiff who has suffered an injury because of a lessor or licensor's failure to comply with his or her duty to keep residential premises and common areas fit for their intended use, to keep the premises in reasonable repair, and to comply with applicable state and local health and safety laws. See *Laurendine v CCA Assoc Ltd Partnership*, unpublished opinion per curiam of the Court of Appeals, issued March 21, 2006 (Docket No. 257775); *Rincones v Kramer*, unpublished opinion per curiam of the Court of Appeals, issued

February 23, 2006 (Docket No. 256706); *Hysni v Cornwall Plumbing, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2004 (Docket No. 243564).[2]

The black-ice journey continued with this Court's decision in *Teufel, supra*. In *Teufel*, the plaintiff was injured when he slipped and fell on ice near a pile of snow in the parking lot of his apartment complex, and this Court made at least three substantive rulings. First, the *Teufel* Court held that the snow and ice that plaintiff fell on were open and obvious and the Court affirmed the lower court's grant of summary disposition. *Id*. at 428-429. Second, the *Teufel* Court held that MCL 554.139 does not impose a duty upon a landlord to keep a parking lot free from ice and snow, which might cause someone to slip and become injured. *Id*. at 429 n 1. This dispositive ruling was made in a footnote. Finally, the *Teufel* Court, relying on our Supreme Court's decision in *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), also held that the plaintiff 's claims against the snow-plowing contractor for negligent performance of his duties under the snow-removal contract were properly dismissed because the contractor owed no duty to the plaintiff that was separate and distinct from his contractual obligations. *Teufel, supra* at 429-430.

Conversely, in 2006, a panel of this court, in *Benton v Dart Properties Inc*, 270 Mich App 437, 443-444; 715 NW2d 335 (2006), held that MCL 554.139(1)(a) did impose a duty on a landlord to keep sidewalks free of ice and snow. The *Benton* Court concluded that outdoor sidewalks in an apartment complex constituted "common areas" under the statute and, thus, a landlord has a duty to take reasonable measures to ensure that the sidewalks are fit for their intended use, including removing ice and snow in a timely manner. *Id.* Noteworthy is the fact that the *Teufel* decision was not mentioned anywhere in *Benton*.

Following the *Benton* snow-covered sidewalk detour, this Court was presented with yet another case involving an icy, snow-covered parking lot. In *Allison v AEW Capital Mgt, LLP*, unpublished opinion per curiam of the Court of Appeals, issued November 28, 2006 (Docket No. 269021) (*Allison I*), vacated by *Allison v AEW Capital Mgt, LLP*, unpublished order of the Court of Appeals, entered January 19, 2007, the plaintiff, a tenant in the defendant's apartment complex, slipped and fell on ice and snow in the parking lot as he was attempting to reach his car. *Id*. at slip op p 1. The plaintiff filed suit, arguing that the defendant breached its statutory duty under MCL 554.139(1) and its common-law duty to warn and protect against this hazardous condition. *Id*. The *Allison I* Court declared a conflict with *Teufel* and concluded that but for the *Teufel* decision, which the panel admitted was binding under MCR 7.215(J)(1), it would have held that a landlord did indeed have a duty under MCL 554.139 to keep parking lots free from snow and ice. *Id*. at slip op p 2. The *Allison I* Court based its preferred holding, in part, on the decision in *Benton*, extending the *Benton* "common area" analysis from sidewalks to a parking lot, as well as the panel's contention that the reasoning in *Teufel* was flawed. *Id*. at slip op pp 2-3.

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[2] While I acknowledge that these unpublished opinions have no precedential effect under MCR 7.215(C)(1), they are used to show my agreement with the *O'Donnell* holding and the fact that I have followed *O'Donnell* on several occasions.

The *Allison I* decision necessitated a vote of the entire Michigan Court of Appeals to determine whether there was a conflict between *Teufel* and *Allison I*. After a vote of the entire Court, a conflict was not declared, *Allison v AEW Capital Mgt, LLP*, unpublished order of the Court of Appeals, entered December 21, 2006, and *Teufel* appeared to be the reigning rule of the road. However, the plaintiff in *Allison* moved for reconsideration, a proper procedural tool by any party under MCR 7.215(I)(1) and (J)(7), and the *Allison* panel granted reconsideration and vacated its original opinion. *Allison v AEW Capital Mgt, LLP*, unpublished order of the Court of Appeals, entered January 19, 2007. On reconsideration, the *Allison II* Court reissued its opinion and held that a landlord does have a statutory duty to keep a parking lot free of ice and snow. *Allison II*, *supra*.

The *Allison II* Court avoided the binding effect of *Teufel* by declaring that the *Teufel* Court's use of a footnote to substantively state that MCL 554.139 imposed no duty upon a landlord to remove ice and snow did not create a rule of law. *Allison II*, *supra* at 669-670. The *Allison II* Court reasoned, "Had our Court in *Teufel* intended to create a rule of law regarding the availability of the open and obvious danger doctrine when a landlord has statutory duties under MCL 554.139(1)(a) and (b), it would have done so in the body of the opinion rather than in a footnote." *Id*.

The *Allison II* Court relied on our Supreme Court's decision in *Guerra v Garratt*, 222 Mich App 285, 289-292; 564 NW2d 121 (1997), to support its conclusion that if the *Teufel* Court wanted to create a rule of law regarding MCL 554.139, it should have included its analysis "in the body of the opinion rather than in a footnote." While I have immense respect for my distinguished colleagues on the *Allison* panels (and those on the *Benton* panel as well), I do not believe that the *Guerra* decision supports this proposition. *Guerra* concerned a previous decision in the case of *Lemmerman v Fealk*, 449 Mich 56; 534 NW2d 695 (1995), and whether footnote 15 in *Lemmerman* addressed the retroactivity of *Lemmerman* or articulated an exception to the rule of law expressed in *Lemmerman*. *Guerra*, *supra* at 289-292. *Guerra* did not speak directly to the issue whether a footnote can create a rule of law.

The use of footnotes is a long-established practice of this Court, often employed to express an additional legal proposition or contrary judicial holding without interrupting the flow of the opinion. The circumstances that cause a perspective or legal conclusion to be included in a footnote or within the body of the opinion, can vary from panel to panel and issue to issue. Further, the placement of a ruling in a footnote should not determine its precedential value. See *Zsigo v Hurley Med Ctr*, 475 Mich 215, 234 n 3; 716 NW2d 220 (2006) (KELLY, J., dissenting) (noting that "footnotes do sometimes set the state of the law"). Instead, the relevant question should be whether the footnote is dispositive or merely dicta. Dictum is defined as """[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential . . . ."" *Dessart v Burak*, 252 Mich App 490, 496 n 5; 652 NW2d 669 (2002), quoting *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001), quoting Black's Law Dictionary (7th ed). The *Teufel* footnote, which disposed of one of the plaintiff 's arguments, was clearly not dictum. Therefore, it was binding on the *Allison II* Court. Ironically, the *Benton* opinion itself contains two footnotes that I consider to be legally significant, without which the opinion would lose a measure of import.

The *Allison II* Court also expressed a concern that the *Teufel* decision did not attempt to distinguish *O'Donnell* or even mention the *O'Donnell* case whatsoever in its analysis. But it is important to remember that *O'Donnell* involved a defective staircase in a resort cabin, with state and local ordinances applying as well, and the defendant was on notice of the defective condition. It did not involve ice and snow in a parking lot. Therefore, it is factually distinguishable. Further, as noted above, the *Benton* opinion did not discuss the *Teufel* decision anywhere.

For these reasons, I do not believe that the *Allison II* Court was correct in disregarding the binding effect of the *Teufel* decision; therefore, I must part ways with the majority decision, which concludes that the trial court erred in granting defendant's motion for summary disposition of plaintiffs' statutory claims because the *Allison II* decision controls in this case. Further, I am hopeful that this chronology will induce the cartographers within the Hall of Justice to provide a concrete ruling for litigants, landlords, the bench, and the bar regarding their rights and responsibilities when it comes to snow-covered surfaces, either sidewalks or parking lots, in the state of Michigan.

/s/ Bill Schuette